IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 399

LYKES-YOUNGSTOWN CORPORATION and
LYKES BROS. STEAMSHIP CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ODELL KOMINERS
J. ALTON BOYER
MICHAEL JOSEPH
500 Tower Building
Washington, D.C. 20005
Counsel for Petitioners

Of Counsel:
KOMINERS, FORT,
SCHLEFER, FARMER &
BOYER

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The petitioners, Lykes-Youngstown Corporation and Lykes Bros. Steamship Co., Inc., respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Claims entered in this case on January 23, 1970.

OPINION BELOW

The opinion of the Court of Claims, reported at 420 F. 2d 735, is reproduced in the Appendix hereto, pp. 1A-17A.

JURISDICTION

The judgment and opinion of the Court of Claims were entered on January 23, 1970; and a timely motion for rehearing was denied by that court on April 17, 1970 (pp. 18A-19A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether, under a tripartite Government contract containing standard-form provisions, the Court of Claims may give the same standard provision one interpretation to determine the relationship between the Government and one party and a contrary interpretation to determine the relationship between the Government and the other party.

2. Whether the Court of Claims may conclude that agency action under a Government contract is not capricious, arbitrary or an abuse of discretion, without knowing or finding the reasons for that action and without considering the agency's contrary actions as to others similarly situated or pertinent agency policy considerations with which that action conflicted.

3. Whether the Court of Claims may, under its summary judgment procedure, resolve genuine issues of material fact bearing upon the interpretation of a contract.

STATEMENT OF THE CASE

Petitioner Lykes Bros. Steamship Co., Inc. is an owner and operator of ocean-going cargo ships on regular routes between United States ports and foreign ports throughout the world, operating under an operating-differential subsidy contract with respondent pursuant to Title VI of the Merchant Marine Act, 1936 ("Act"), 49 Stat. 2001, 46 U.S.C.

§§1171-1175.[1] Respondent executed the contract through the Federal Maritime Board, later succeeded by the Maritime Subsidy Board.[2]

That contract, for a 20-year term beginning in 1958, required petitioner to perform specified numbers of voyages annually on trade routes found by the Board to be essential trade routes of the United States, and further required petitioner to replace its existing ships by entering into contracts to build new ones in accordance with a specified replacement program. Petitioner was required to have such new ships constructed in United States shipyards, and its obligation to do so was conditioned upon the Board's promise to pay a portion of their cost through construction-differential subsidy pursuant to Title V of the Act; 49 Stat. 1995, 46 U.S.C. §§1151-1161 (Ex. 1).[3] Though petitioner

[1] During the period involved in the present case these shipping activities were conducted by, and the contracts involved herein held by, Lykes-Youngstown Corporation, then named Lykes Bros. Steamship Co., Inc. Thereafter these shipping activities and contracts were transferred to a new wholly-owned subsidiary, also named Lykes Bros. Steamship Co., Inc. See p. 1A, *infra*, note 1. For convenience, both corporate entities are hereinafter collectively referred to as "petitioner."

[2] Until August 12, 1961, respondent acted through the Federal Maritime Board and the Department of Commerce, Maritime Administration, created by Reorganization Plan No. 21 of 1951, 64 Stat. 1273. By Reorganization Plan No. 7 of 1961, 75 Stat. 840, the relevant functions theretofore performed by the Federal Maritime Board were transferred to the Secretary of Commerce, who delegated those functions to the Maritime Administration and Maritime Subsidy Board by Department Order 117, 21 Fed. Reg. 3637, as amended by Department Order 117-A, 31 Fed. Reg. 8087, renumbered Department Order 25-2A, 35 Fed. Reg. 115, while retaining the right to review actions of the Maritime Subsidy Board (see 46 CFR, Part 202). All of these agencies are sometimes hereinafter referred to as the "Board."

[3] References to "Ex. " are to the numbered exhibits attached to the stipulation as to authenticity, dated January 30, 1969, contained in the record.

was involved in the payment mechanism, construction-differential payments, as the court below correctly stated (p. 2A, *infra*), are a shipyard, not a steamship, subsidy, designed to promote domestic shipyards by equalizing the cost of building ships in such yards with the substantially lower cost of building in foreign yards.

In furtherance of the replacement program under the 1958 contract, petitioner and the Board in 1963 and 1964 entered into contracts for the construction of twelve new ships.[4] There were three pairs of contracts, with each flight of four ships covered by a construction contract among petitioner (the "Owner"), the domestic shipyard (the "Contractor") and the Board (*e.g.*, Exs. 2, 8) and a construction-differential subsidy contract simultaneously executed by petitioner and the Board (*e.g.*, Ex. 3). These contracts, and particularly the specific provisions here involved, were drafted by the Board, and contained standard-form clauses utilized by the Board in similar contracts over a period of years.[5] The critical provisions, insofar as the present case is concerned, are those dealing with the right of the Owner to direct changes in the contract plans and specifications

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[4] In Moore-McCormack Lines, Inc. v. United States, 188 Ct. Cl. 644, 667-668 (1969), the Court of Claims stated with respect to owners such as petitioner that have operating- and construction-differential subsidy contracts with the Board:

> The legal reality is that, at this point in their dealings with the Government, the plaintiffs' interest in the [construction-differential] subsidy is not a matter of grace or of more statutory largesse, but of mutually enforceable undertakings . . . . In a word, the plaintiffs now have a contractual right to the construction subsidy, a right which was potential from the time . . . when they first signed their operating-subsidy agreements. They are not new applicants for a grant which the Government will or will not give, as it wishes. Nor are they bidders for a new contract which the Government may or may not award to them.

[5] See 46 CFR § 290.1; and see, *e.g.*, Exs. 67, 68 and 69; and see Sun Shipbuilding and Dry Dock Co. v. United States, 183 Ct. Cl. 358, 364-365 (1968).

during the progress of the work and the division of responsibility between the Owner and the Board to pay for such changes.

The construction contracts gave petitioner, the Owner, the right (with the approval or authorization of the Board) to direct changes in the contract plans and specifications, and provided for increases or decreases in the contract price, as appropriate (Ex. 8, Article 4). The respective obligations to pay for changes were spelled out in the construction contracts as follows (*e.g.*, Ex. 2, Article IV(a)(ii)):

> The Board shall pay the Contractor . . . 49.8% . . . and the Owner shall pay the Contractor . . . 50.2% of . . . the net increase in Contract Price . . . for changes in the contract work approved by the Board as eligible for construction-differential subsidy . . . .[6]

The subsidy contracts expressed the same obligations in the following, practically identical, language (*e.g.*, Ex. 3, Articles 1(a)(ii) and 2(b)):

> The Board grants . . . [a] sum which shall be equal to 49.8% of the net increase in the Contract Price under . . . [the related construction contract] for changes in the contract work . . . approved by the Board as eligible for construction-differential subsidy . . . .
>
> * * *
>
> The Board agrees to pay the Shipbuilder 49.8% of . . . the net increases in . . . Contract Price . . . [under the related construction contract] on account of changes in the contract work, approved by the Board as eligible for construction-differential subsidy . . . .[7]

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[6]The quoted language is from one of the three pairs of contracts. The second and third pairs contained substantially identical provisions, but specified different percentages of the cost of changes to be borne by the Board—53.9% in the second pair and 55% in the third.

[7]See note 6, *supra*.

As the contract work progressed petitioner, in early 1965, proposed to direct a change in the specifications to add to each ship a newly-developed device known as a "bow thruster"—a propeller mechanism installed through the bow of the ship to provide lateral propulsion and control of the bow independent of the main propulsion system and rudder. In accordance with the contracts, petitioner requested the Board's approval of the change, which also included a proposal to install at the stern of each ship mooring devices known as constant tension mooring winches (hereinafter the "bow thrusters change") (Ex. 16).

Throughout the Board's consideration of the bow thrusters change request, the operating and economic merit of the change was never challenged and it was admitted that it complied with a pertinent Board policy statement published for comments prior to the request and formally adopted prior to the Board's final rejection of the request (*e.g.*, Ex. 28).

The Board approved the proposed change (Ex. 30). It also determined to pay subsidy for that change, thereby necessarily approving it as "eligible for construction-differential subsidy" under the above-quoted contract provisions. But instead of paying the contract-specified percentages (49.8%, 53.9% and 55%) of the increase in price resulting from the change, it stated that it would pay only an amount equivalent to approximately one-half of the contract-specified percentages. This it did by applying an *ad hoc* formula, never used before or since, under which it stated that it would pay the contract-specified percentages of the increase in price that *would have* resulted from a hypothetical and less costly change not requested by petitioner, not directed by the Board and not in fact performed—a change that would have added constant tension mooring winches both fore and aft, and no bow thruster (Ex. 30).

Petitioner unsuccessfully sought reconsideration by the Board and review by the Secretary of Commerce. Meanwhile, the bow thrusters change was effected and the Board

paid only that portion of the cost resulting from application of the foregoing formula, without prejudice to petitioner's right to seek additional payment in court (see Exs. 63-65).

Thereafter petitioner brought the present action in the Court of Claims seeking damages of $784,168, representing the difference between the Board's actual payment for the bow thrusters change and the amount that the Board would have paid had it applied the contract-specified percentages of its participation to the cost of that change. Jurisdiction of that court was invoked under 28 U.S.C. §1491, petitioner's claim being founded upon express contracts with the United States.

Petitioner moved for summary judgment, arguing that under the above-quoted contract provisions the Board had no discretion to pay less than its contract-specified percentage of a price increase resulting from a change approved as eligible for subsidy. Petitioner relied in part upon an earlier case involving the same standard-form provisions, but different facts, in which the Court of Claims had held that this interpretation of the contract language was "reasonable" and upon that basis had awarded judgment against the Government in favor of the shipyard. *Sun Shipbuilding and Dry Dock Co. v. United States*, 183 Ct. Cl. 358, 373 (1968). Petitioner further argued that even if the Board had such discretion it had abused that discretion and acted arbitrarily and capriciously with respect to the bow thrusters change because, *inter alia*, its action was contrary to its own declared policy and was discriminatory when compared with its payments for bow thrusters on ships of other owners.

The court below denied petitioner's motion, granted respondent's cross-motion for summary judgment and dismissed the action. It held that insofar as petitioner was concerned, the Board had discretion under the same contract language to pay less than the contract-specified percentage of the cost of the change (p. 14A, *infra*) and therefore could base its percentage of participation upon the lesser cost of a change not in fact made. It reached

this conclusion because of a 1960 letter received by a trade association of which petitioner was a member, which, the court stated (pp. 14A-15A, *infra*), "put . . . [petitioner] on notice" that the Board so interpreted the above-quoted language and that petitioner executed the contracts "with this knowledge." The court relied in this respect upon another aspect of its holding in the *Sun* case, *supra*, 183 Ct. Cl. at 374-377.[8]

Summary judgment was awarded respondent on the foregoing basis, in the face of an affidavit of its president to the effect that petitioner had *not* understood that the Board interpreted the pertinent language to permit it to do what it did here.[9]

Finally, having found that the Board had discretion to pay less than its contract-specified share of the cost of an eligible change, the court concluded (p. 17A, *infra*) that the Board had not abused that discretion or acted arbitrarily without the court considering or making any findings as to the reasons for the Board's action, Board policy statements with which petitioner contended the Board's action was inconsistent, or the Board's inconsistent actions with respect to other owners. Indeed, the court found that in fact "the Board did not give any reason for its action" and held that this was "not material" (p. 15A, *infra*).

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[8]The *Sun* case involved the same contract provisions and the same 1960 letter. That letter, discussed at pp. 18-19, *infra*, referred, *inter alia*, to a policy of basing subsidy upon the cost of change work that would have been incurred had the same work been incorporated into the original contract specifications and not added as a change. This was the policy enforced against the owner in the *Sun* case, but not involved in the present case.

[9]Affidavit of Frank A. Nemec.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SIGNIFICANT ISSUES RESPECTING THE ADMINISTRATION OF STANDARD-FORM GOVERNMENT CONTRACT PROVISIONS.

The lower court's holding that standard-form contract language may have completely different meanings for different Government contractors has broad implications.[10] The widespread use of standard-form provisions in Government contracts is well known to the Court. See, *e.g.*, *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 415-417 (1966). The desirability of uniform interpretations of standard-form language has been expressed by the largest contracting agency, the Department of Defense, by its establishment of strict guidelines which must be followed by contracting officers seeking deviations from standard-form provisions. ASPR, 32 CFR §1.109.[11] The desirability of uniform interpretation of the Maritime Board's standard-form contract clauses was recently recognized by the Court of Appeals for the District of Columbia Circuit in *Bethlehem Steel Corporation v. Grace Line, Inc.*, 416 F.2d 1096, 1107 (1969), where, in referring an owner's contract claim against

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[10] In arriving at these two different interpretations the court here, and in *Sun*, implied that there were differences between the construction contract, to which the shipyard was a party, and the construction-differential subsidy contract. In *Sun* the court implied that the two contracts could be interpreted differently because the subsidy contract referred to increases in the contract price for changes "ineligible" for subsidy as well as those "eligible" for subsidy (183 Ct. Cl. at 375-376). But the construction contract likewise referred to increases for changes "not eligible" for subsidy. In fact all the material language of each contract was the same. Moreover, the contracts were simultaneously executed, petitioner was a party to, and relied upon, both, and the Government itself has never contended that different results were intended.

[11] Implicit therein is the proposition that when deviations are justified and permitted, they shall be by revision of the standard-form language, not by retention of the standard-form as altered by a letter from the contracting officer or agency head.

the shipyard to the Board for preliminary findings, the court stated:

> The Maritime Administration's *pro forma* contract is an important cog in the statutory machinery sustaining the vitality of the Nation's shipbuilding industry through governmental participation in the construction of commercial vessels in American shipyards. The Administration drafted the contract as an industry-wide document through utilization of which the Administration might regulate the contractual relations of shipowners and shipbuilders. Not only is the Administration uniquely qualified to interpret the contractual language, but also *to maintain nationwide uniformity in construction of its provisions* . . . [emphasis supplied; footnote omitted].

Cf. United States v. Bianchi & Co., 373 U.S. 709, 718 (1963). Uniformity, the very purpose of employing standard-form contract provisions, is defeated by the Court of Claims decision, and any decision having that result should be subject of scrutiny.

The particular circumstances and reasoning upon which the lower court based its conclusion emphasize the dangers inherent in its decision. Notwithstanding the precise and seemingly unambiguous language of the contract, requiring the Government to pay a fixed percentage of the price increases resulting from changes approved as eligible for subsidy, the Court of Claims found in *Sun* that that language was ambiguous. In *Sun* it resolved that ambiguity in favor of the shipyard and against the Government as the drafter—a holding cited with approval by this Court in *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Both in *Sun* and here, however, it declined to follow that rule as to the Owners, and instead resolved the same ambiguity in favor of the Government upon the theory that the Government actually intended a different meaning for the same language and that the Owners knew or "had reason to know" the Government's intended meaning and were therefore bound by that meaning (p. 13A, *infra*).

There was no evidence before the court that petitioner, or even the Government itself at the time the contracts were signed, in fact understood the contract language to confer upon the Government the authority to limit its share of the cost of an approved change to the cost of a hypothetical change not sought or performed (and the 1960 letter, discussed *infra*, pp. 18-19, did not so state). The only direct evidence before the court as to either party's understanding of the contracts at the time they were signed was an affidavit stating that petitioner had *not* then so understood the contracts.[12] The court did not refer to this evidence but instead imputed the foregoing understanding from the 1960 letter, the applicability of which to the instant situation was vague at best,[13] and which was sent three years prior to the execution of the contracts here involved,[14] not to petitioner but to a trade association of which petitioner was a member.[15] That letter made no reference to the "changes" clauses in suit or, indeed, to any specific contract provision,[16] was sent by the Chairman of the Board's predecessor agency under circumstances raising considerable doubt as to whether its contents were ever authorized even by that agency,[17] was never formally published, conflicted with other Board policy statements relating to changes under subsidy contracts,[18] and was never even suggested to be applicable in petitioner's situation until this case reached the Court of Claims.[19] Moreover, there

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[12] Affidavit of Frank A. Nemec.

[13] Its substance is discussed at pp. 18-19, *infra*.

[14] Exhibit A to Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

[15] *Ibid.*

[16] *Ibid.*

[17] See Affidavit of Michael Joseph.

[18] See Exs. 14, 50.

[19] The letter first made its appearance as an appendix to the Government's brief; it was never referred to by the Board or its staff in connection with the bow thrusters change request.

was no evidence before the court that the 1960 letter was ever mentioned to petitioner during negotiation of the 1963 and 1964 contracts in suit, and there was no reference to the letter in the relevant Board files produced in pre-trial discovery. Yet, upon the basis of such a letter the lower court gave the contract changes provisions a different meaning in determining the legal relationship between the Government and petitioner from that given the same provisions as between the Government and the shipyards under the same contracts.

Interpretation of standard-form Government contract clauses in this way will place contractors and the Government in precarious positions indeed, for neither party will be able confidently to predict how a particular clause may be interpreted by a court; there may always be lurking in the background some similarly obscure letter to a trade association or to someone connected with the contract expressing the "true" meaning of the clause. Parties will no longer be able safely to rely upon previous contract interpretations with respect to other parties when determining whether to bid for a contract. Bidders who have been awarded contracts represented to contain standard-form provisions may subsequently find that the standard provision means something special for them by virtue of an expression of the contracting officer made before actual execution of the contract. Potential bidders who are advised that the Government will give peculiar interpretations to standard-form provisions included in the invitation will be in a different (whether more or less advantageous) position from those who may not have received such advice. Litigation thought to have settled the meaning of widely utilized standard form provisions may be followed by more litigation to determine the meaning of individual expressions purporting to alter the meaning of such provisions. The benefits of uniform contract language may be largely nullified, with a potential effect reaching the entire body of standard-form clauses, and hence the administration of Government contracts generally.

The decision below also frustrates a cardinal purpose of Title V of the Merchant Marine Act, 1936, establishing the construction-differential subsidy system. The purpose of Title V and of the implementing contracts here in suit was to promote the domestic shipbuilding industry through Government payments to the shipyards of the differential between United States shipyard costs and lower costs for equivalent construction in foreign yards. So far as the owners are concerned, the purpose of Title V was merely to place them in the same financial position as if they were permitted to build ships in foreign yards; *i.e.*, to avoid their being penalized by the requirement that they build ships in domestic shipyards. See S. Rep. No. 1721, 74th Cong., 2d Sess. (1936) 7. The lower court's decision forces the owners to pay not only the equivalent foreign cost of the changes but also a portion of the Government's subsidy obligation to the shipyard, thereby frustrating the Act's "parity" objective.

II. THE DECISION BELOW RAISES SIGNIFICANT ISSUES RESPECTING THE PROPER FUNCTION OF A REVIEWING COURT IN MATTERS INVOLVING THE EXERCISE OF DISCRETION BY CONTRACTING AGENCIES.

Assuming *arguendo* the validity of the Court of Claims holding that the contract changes clause conferred discretion upon the Board as to the amount of its payment for changes eligible for subsidy, the decision below also raises questions with respect to the obligation and function of a reviewing court called upon to consider agency action under a contract clause held to confer discretion.

There were issues before the lower court as to both the underlying reasons for the Board's action upon the bow thrusters change and the validity of those reasons. Petitioner contended the Board's action was without rational

basis,[20] that it violated the Board's own stated policies respecting approval of and payment for eligible changes,[21] and that it was inconsistent with the Board's actions with respect to other owners similarly situated and was in this respect unjustly discriminatory against petitioner.[22]

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[20]The hypothetical change, the cost of which served as the basis for the Board's computation of its share of subsidy, was the installation of constant tension mooring winches fore and aft, rather than the actual change of installing a bow thruster forward and winches aft. The rationale that was given to petitioner by the Board's Secretary (Ex. 32) was, in essence, that the Board's policy was to authorize mechanization changes having the effect of reducing labor input (a policy first expressed to petitioner on this occasion) and that since the hypothetical change would reduce such input as much as would the actual change, the Board would pay its share only of the cost of the lesser hypothetical change. The principal difficulty with this rationale was that a bow thruster is not a mooring device and is not utilized principally to reduce labor input; rather, its primary advantages are reduction of need to hire tugs and reduction of damage to ships when maneuvering in confined waters—considerations to which the Board never addressed itself.

Petitioner urged, with ample support in the record, that the real reason for the Board's action was a self-imposed "moratorium" on subsidy for changes under existing contracts, which petitioner contended violated its rights under those contracts. Respondent admitted in its answer that the action had been based in part on the moratorium.

[21]During its consideration of the bow thrusters change the Board also had under consideration a policy statement clarifying and modifying existing policy as to changes (Ex. 14), which it adopted in final form prior to its last action upon petitioner's bow thrusters change request (Ex. 50). That statement provided, *inter alia*, that subsidy for changes would be allowed if it could be demonstrated that the added investment would produce a return to the Owner of at least 10% after taxes over the life of the investment. Respondent's answer below admitted that the bow thrusters change satisfied this requirement.

[22]This discrimination was based upon the facts of record (Exs. 67, 68, 69, 70) that the Board had paid the full contract-specified rate of subsidy for bow thrusters included in the ships of four other owners. While those owners had included bow thrusters in their original contract specifications, bow thrusters were a new technological

The Court of Claims itself has recognized that "[a] party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously,"[23] and also that operators under the Merchant Marine Act, 1936, have a "right . . . to non-discriminatory treatment" by the Board.[24] In the present case, however, the same court did not even mention petitioner's argument respecting discriminatory treatment by the Board. Even more significant, from the standpoint of its application to future cases, the court concluded that the Board's action was not arbitrary or an abuse of discretion without even inquiring into or making any findings as to the reasons for the Board's action. On the contrary, the court held (p. 15A, *infra*):

> . . . As a matter of fact, the Board did not give any reason for its action nor state on what basis it was limiting its subsidy participation . . . . It may have had more than one valid reason. . . . *but that is not material* [emphasis supplied].

A judicial holding that agency action is not an abuse of discretion with no inquiry into the reasons therefor is novel and should be reviewed by this Court. This Court has stated with respect to the exercise of agency discretion in general:

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development at the time in question and there was no suggestion that petitioner should have included them in its original specifications. In other cases, such as the *Sun* case, *supra*, where the Board has found that requested change work should have been included in original specifications, it has at least paid the fixed rate of subsidy upon what the cost of *that* work would have been if originally included.

[23] *Pacific Far East Line, Inc. v. United States*, 184 Ct. Cl. 169, 184 (1968); *Moore-McCormack Lines, Inc. v. United States*, 188 Ct. Cl. 644, 669 (1969). The former case dealt with the Maritime Board's operating-differential subsidy contract; the latter with its construction-differential subsidy contract.

[24] *American President Lines, Ltd. v. United States*, 154 Ct. Cl. 695, 705 (1961).

> . . . [*SEC v.*] *Chenery* [*Corp.*, 332 U.S. 194 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
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> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). With respect to agency discretion under contracts subject to the Wunderlich Act, 68 Stat. 81, 41 U.S.C. §321, that Act provides that agency decisions may not be "capricious or arbitrary" and must be "supported by substantial evidence."[25] In *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 704 (D.C. Cir., 1969), the court was "appall[ed]" by the Maritime Board's failure to give reasons for certain determinations relating to operating-differential subsidy contracts because a party affected thereby could not "meaningfully prepare a request for reconsideration of a decision which contains no reasons . . . ." It is an *a fortiori* conclusion that a court cannot meaningfully review Board determinations without first determining the reasons for those determinations. As Mr. Justice Frankfurter pointed out in *Brown v. Allen*, 344 U.S. 443, 496 (1953), "Discretion without a criterion for its exercise is authorization of arbitrariness."

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[25] In *Moore-McCormack Lines, supra*, 188 Ct. Cl. at 669, the Court of Claims found that the Board's exercise of discretion under its construction-differential subsidy contracts was subject to these statutory requirements.

Instances of provision for exercise of discretion by the Government under its contracts are commonplace.[26] The decision of the court below, purporting to find a valid exercise of agency contractual discretion without knowing the reasons underlying its exercise, will, if uncorrected, stand as authority for arbitrariness far beyond the particular area of discretionary authority here involved.

III. THE DECISION BELOW RAISES QUESTIONS AS TO THE APPROPRIATE USE OF SUMMARY JUDGMENT PROCEDURE BY THE COURT OF CLAIMS.

Under the lower court's reasoning, its view of the contract language as ambiguous made material the question of petitioner's and the Board's understanding of that language at the time the contracts were executed. It was petitioner's position that there was nothing in the record expressing the Board's understanding of the language in 1963 and 1964. As for its own understanding, however, petitioner submitted an affidavit clearly stating what its 1963 and 1964 understanding in fact was. If this affidavit was not sufficient to dispose of the matter in petitioner's favor, it was at least sufficient to raise a genuine issue of material fact to be resolved at trial. The court, however, resolved that issue in favor of respondent by granting its cross-motion for summary judgment.

Under summary judgment procedure it does not follow that when one party's motion is denied the opposing party's

[26] See, *e.g.*, the standard provision for "equitable adjustment" with respect to Government-directed changes, ASPR, 32 CFR §7.602-3; the provision for such adjustment "if . . . [the contracting officer] finds" a material difference in site conditions, ASPR, 32 CFR §7.602-4; the provision for determination of excusable delay by the contracting officer under the termination clause, ASPR, 32 CFR §7.602-5; the provision for correction of material or workmanship "found by the Government not to conform to the contract requirements," ASPR, 32 CFR §7.602-11; and indeed, the basic provision for contracting officers' decisions under the standard "disputes" clause, ASPR, 32 CFR §7.602-6.

cross-motion should be granted. Professor Moore has stated, with respect to summary judgment procedure in the district courts, that "neither a single motion nor multiple motions can dissipate factual disputes."[27] that "[i]f it is not clearly established that there is no dispute as to the facts which would justify judgment for one of the parties, then the court may not properly grant him judgment, even though each side has moved for summary judgment in its favor,"[28] that "the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . which . . . entitle him to judgment . . ."[29] and that "all inferences of fact . . . must be drawn against the movant."[30] The same result is contemplated by Rule 101(d) of the Court of Claims, which parallels Rule 56 of the Federal Rules of Civil Procedure.[31]

Specifically, in connection with the issue of contract interpretation there was before the lower court the following:

First, there was the contract language itself which the court in *Sun* had held was reasonably susceptible to the interpretation urged by petitioner here.

Second, there was the 1960 letter, which referred to no contract language and stated that the Federal Maritime Board had agreed to the following particular policies:

> 1. In shipbuilding contracts involving the payment of Government subsidy, there will be an

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[27] 6 J. W. Moore, *Federal Practice* (2d ed. 1966) p. 2248.

[28] *Id.* at 2251.

[29] *Id.* at 2335.

[30] *Id.* at 2337.

[31] The Court of Claims rule provides that summary judgment shall be rendered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

overall limitation of 2% of the single vessel contract price in connection with the authorization of changes under contract and approved cost settlements.

2. In exceptional cases and upon consideration of pertinent facts, the Board may during the construction of each vessel raise the limit of authority and approve cost settlements to the level it deems to be warranted by the special circumstances.

3. Where major changes are involved, even within the 2% limitation, and when such changes are warranted, the Board may approve changes but limit the subsidy participation to the cost based on the change having been included in the original bid at time of award.

The letter did not state that subsidy might be disallowed on any other basis.[32]

And third, there was the direct evidence of petitioner's understanding in 1963 and 1964—the affidavit of its president, expressly stating that he had not understood the contract language to give the Board discretion "to limit its share of the cost of eligible changes either by paying a rate of subsidy lower than that stated by the contract or by applying the contract-specified rate to the cost of a change different from the change requested by the Owner."[33]

Although the affidavit would seem to have been dispositive of the matter in petitioner's favor, the court below resolved the matter by drawing inferences precisely contrary to the statements in the affidavit and against petitioner. While this view of the evidence might have been sufficient

[32] Exhibit A to Defendant's Opposition to Plaintiff's Motion for Summary Judgment. In acting on petitioner's change request the Board never mentioned either the "2%" policy or the "original cost" policy expressed in the letter. Indeed, full subsidy for changes well in excess of 2% had already been authorized by the Board at the time of the bow thrusters request. See Affidavit of Ludwig C. Hoffmann, Exhibit F to Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

[33] Affidavit of Frank A. Nemec.

for the court to deny petitioner's motion for summary judgement and set the matter for trial, it did not warrant the granting of respondent's cross-motion. See *United States v. Diebold*, 369 U.S. 654 (1962), where the Court held that summary judgment had been erroneously granted because "inferences contrary to those drawn by the trial court might be permissible." The lower court's treatment of this case leaves its summary judgment procedure in a state of confusion which should not go uncorrected.[34]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ODELL KOMINERS,
J. ALTON BOYER
MICHAEL JOSEPH
500 Tower Building
Washington, D.C. 20005
Counsel for Petitioners

Of Counsel:
KOMINERS, FORT, SCHLEFER,
FARMER & BOYER

July 15, 1970

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[34]The opinion contains another example of questionable use of the court's summary judgment procedure. Petitioner had alleged that the Board's action had in fact been based upon a "moratorium" on funds for changes under contracts. Although respondent admitted in its answer that the action was based in part upon that moratorium, the court stated, "We find no evidence that .... [the Board] based its decision on the moratorium" (p. 17A, *infra*).

In the United States Court of Claims

No. 399–67

(Decided January 23, 1970)

LYKES-YOUNGSTOWN CORPORATION v. THE UNITED STATES

J. Alton Boyer, for plaintiff. *Odell Kominers*, attorney of record. *J. Alton Boyer*, *Michael Joseph*, and *Kominers, Fort, Schlefer, Farmer & Boyer*, of counsel.

Edward J. Friedlander, with whom was *Assistant Attorney General William D. Ruckelshaus*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

This is a suit by a steamship company against the United States for damages for an alleged breach of three construction-differential subsidy contracts involving the construction of twelve ships. (Four ships in each of the contracts.)[1]

[1] This action was originally brought by Lykes Bros. Steamship Co., Inc., the corporation that was involved in all of the matters referred to herein. In May 1968, the name of that corporation was changed to Lykes Corporation and its entire shipping business, including the contracts here in suit and the vessels constructed thereunder, was transferred to a newly-organized subsidiary, also-named Lykes Bros. Steamship Co., Inc. By order of July 9, 1968, the designation of the original plaintiff herein was changed to Lykes Corporation and the new subsidiary was added as a party plaintiff. On May 28, 1969, Lykes Corporation was merged into and is now known as Lykes-Youngstown Corporation. For convenience, all of these corporations will be referred to herein as plaintiff.

The plaintiff is now, and, at all times relevant to this case, has been engaged in the business of operating ocean-going cargo ships on regular routes found by the Maritime Subsidy Board to be essential trade routes of the United States between ports in this country and ports in foreign countries throughout the world.[1]

These operations are conducted under an operating-differential subsidy contract (No. FMB–59) entered into pursuant to Title VI of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended (46 U.S.C. §§ 1171–1183) by plaintiff and the United States in 1957 for a term of twenty years beginning January 1, 1958. Under this contract, plaintiff is required to perform specified numbers of voyages annually on essential trade routes and to replace its existing ships by contracting to build new ones. The replacement program in the contract required plaintiff to build three groups of four ships each, construction of which was to commence on or about March 18, 1963, July 1, 1963, and July 1, 1964, respectively. Plaintiff's obligation to have these ships constructed was conditioned upon the board's policy to provide construction-differential subsidy pursuant to Title V of the Act for such new construction, and, if not provided, was to be deferred until such subsidy was provided.

The purpose of the construction-differential subsidy, which is a shipyard subsidy, is to equalize the cost of building ships in high-cost domestic United States shipyards with the lower cost of building such ships in foreign shipyards, from the standpoint of the owner, which is required by law and contract to have its ships built in the United States. The plaintiff filed applications for construction-differential subsidy covering each of the three groups of ships and the Board approved such applications and agreed to provide construction-differential subsidy in accordance with contracts entered into between the plaintiff and the defendant as described in the following paragraphs.

On April 4, 1963, November 21, 1963, and June 26, 1964, the plaintiff, as owner, and the Board entered into three construction-differential subsidy contracts Nos. MA/MSB–20,

[1] In all matters relevant to the present case, the United States, defendant, acted through the Federal Maritime Board, Maritime Administration, Maritime Subsidy Board, and the Secretary of Commerce. For convenience, all of these agencies will be referred to herein as the Board.

MA/MSB–31, and MA/MSB–37, each covering a group of four ships and each specifying the terms of the grant of subsidy by the Board in connection with the construction of said ships. At the same time, three construction contracts, Nos. MA/MSB–19, MA/MSB–30, and MA/MSB–36, were entered into between the plaintiff, as owner, and Avondale Shipyards, Inc., as contractor, and the Board, which provided for the construction of the twelve ships by the contractor. These construction contracts are only incidentally involved in this case. Each of the construction contracts contained the same provisions as those set forth below from contract No. MA/MSB–19, differing only in the amount of subsidy per vessel and the percentage for changes determined by the Board to be eligible for subsidy:

* * * * *

ARTICLE IV. *Payment of Contract Price.* (a) Progress payments on account of the Contract Price, adjusted as herein provided, shall be made to the Contractor by the Owner and the Board as the Contract work progresses. * * * Such progress payments shall be made at monthly intervals or at such other intervals as the parties agree and as follows:

(i) The Board shall pay the Contractor forty-nine and eight-tenths percent (49.8%) and the Owner shall pay the Contractor fifty and two-tenths percent (50.2%) of that portion of each progress payment on account of the Contract Price set out in Article I(a) hereof (excluding, however, the sum of Three Thousand Three Hundred and Sixty Dollars ($3,360) of the Contract Price for the National Defense Features incorporated in the Vessels).

(ii) The Board shall pay the Contractor forty-nine and eight-tenths percent (49.8%) and the Owner shall pay the Contractor fifty and two-tenths percent (50.2%) of that portion of each progress payment on account of the net increase in Contract Price, pursuant to Article 4 of the General Provisions, for changes in the contract work approved by the Board as eligible for construction-differential subsidy; provided, however, in the event there is a net decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner and the Board pursuant to this Article IV shall be reduced by the respective percentages of such net decrease.

* * * * *

(v) The Owner shall pay the Contractor one hundred percent (100%) of that portion of each progress payment covering increases in the Contract Price pursuant to Article 4 of the General Provisions hereof on account of changes of the Owner approved by the Board but not approved as eligible for construction-differential subsidy; provided, however, in the event there is a decrease in the Contract Price on account of such changes, the amounts otherwise payable by the Owner shall be reduced by the amount of such decrease.[3]

* * * * *

The contractor is not a party to this suit. When the dispute arose between the plaintiff and the Board, an agreement was signed between them to the effect that the plaintiff would make payments to the contractor in excess of the amounts which plaintiff contends should be paid by it and that the making of such payments should be without prejudice to the rights of the plaintiff to assert its contention in court to recover from the United States the amounts which the plaintiff claims it is entitled to as subsidy for the changes involved in this case. Consequently, we are not required to determine any rights which the contractor may have had with respect to these construction contracts. However, the pertinent provisions of such contracts, which are quoted above, are included here so that the whole picture may be presented with respect to the claim of the plaintiff for subsidy payments arising out of the changes in its vessels described above.

Each of the three construction-differential subsidy contracts contained provisions that are pertinent to this case which are the same as those set forth below from contract No. MA/MSB-20, differing only in the amount of subsidy per vessel and the percentage for changes determined by the Board to be eligible for subsidy:[4]

* * * * *

ARTICLE 1. *Grant of Construction-Differential Subsidy.* (a) The Board grants, in compliance with the

[3] Construction contract No. MA/MSB-30 provided that the Board would pay the contractor 55 percent and the owner 45 percent of the increase in price due to changes approved by the Board as eligible for subsidy and contract No. MA/MSB-36 provided for the payment to the contractor by the Board of 53.9 percent and by the owner 46.1 percent of the increase in price due to changes found eligible by the Board for subsidy.

[4] Contract No. MA/MSB-31 provided for $5,680,495 per vessel and 55 percent for changes approved as eligible for subsidy and Contract No. MA/MSB-37 provided for $5,667,159 per vessel and 53.9 percent increase for changes approved as eligible for subsidy.

provisions of Sections 501 and 502 of the Act, a construction-differential subsidy to aid in the construction of the Vessels by the Owner in the total sum of the following:

(i) A sum of $5,002,073 per Vessel which is the dollar difference between (a) the Board's final determination of the estimated fair and reasonable price of $5,037,000 for constructing each of the Vessels in West Germany (exclusive of the national defense features) and (b) the fixed price bid of $10,039,073 of the Avondale Shipyards, Inc. for the construction of each of the Vessels (exclusive of the national defense features).

(ii) A sum which shall be equal to 49.8% of the net increase in the Contract Price under Contract No. MA/MSB–19 for changes in the contract work pursuant to Article 4 of the General Provisions thereof (exclusive of changes in the national defense features, and exclusive of changes of the Owner approved by the Board as ineligible for construction-differential subsidy) approved by the Board as eligible for construction-differential subsidy and if there shall be a net decrease in the Contract Price on account of changes in the contract work (exclusive of changes of the Owner approved by the Board as ineligible for construction-differential subsidy) the construction-differential subsidy granted by the Board pursuant to this Article 1(a) shall be reduced by 49.8% of said net decrease.

* * * * *

ARTICLE 2. *Board's Payment of Construction-Differential Subsidy and the Cost of National Defense Features.* (a) The Board agrees to pay the Shipbuilder under the provisions of Contract No. MA/MSB–19, 49.8% of that portion of each progress payment on account of the Contract Price set out in Article I(a) of the Special Provisions of Contract No. MA/MSB–19 (excluding the sum of $3,360 which sum covers the national defense features' portion of the Contract Price).

(b) The Board agrees to pay the Shipbuilder 49.8% of that portion of each progress payment on account of the net increases in such Contract Price pursuant to Article 4 of the General Provisions of Contract No. MA/MSB–19 on account of changes in the contract work, approved by the Board as eligible for construction-differential subsidy, and in the event of a net decrease on account of changes deleting subsidized work the payments to be made by the Board as provided in (a) above shall be reduced by 49.8% of such net decrease.

* * * * *

It will be observed from the foregoing provisions of the subsidy contracts that Article 1(a)(1) obligated the United States to pay a grant equal to the dollar difference between established foreign costs for building comparable ships and the cost of building the ships in the United States. These differentials were reflected in Article 2(a) of the contracts as a stated percentage of the total costs. Articles 1(a)(ii) and 2(b) provided that these same percentages were to be applied to the net increases in the contract price for changes in the contract work approved by the Board as eligible for construction-differential subsidy.

The controversy in this case arose out of a request by the plaintiff for Board approval of certain changes which will be described below that plaintiff wished to make in each of the 12 ships and that such changes be found by the Board to be eligible for subsidy. Before discussing this request and the action of the Board thereon, we would like to point out that on November 3, 1960, the Chairman of the Federal Maritime Board sent a policy guidance letter to the Committee of American Steamship Lines, of which plaintiff was a member, advising in relevant part as follows:

* * * * *

> On the basis that the ship owner is mutually interested in reducing shipbuilding costs and in order to establish Federal Maritime Board policy guidance to the Owner, the Board has agreed in the following:
>
> 1. In shipbuilding contracts involving the payment of Government subsidy, there will be an overall limitation of 2% of the single vessel contract price in connection with the authorization of changes under contract and approved cost settlements.
>
> 2. In exceptional cases and upon consideration of pertinent facts, the Board may during the construction of each vessel raise the limit of authority and approve cost settlements to the level it deems to be warranted by the special circumstances.
>
> 3. Where major changes are involved, even within the 2% limitation, and when such changes are warranted, the Board may approve the changes but limit the subsidy participation to the cost based on the change having been included in the original bid at time of award.
>
> The Maritime Administration staff has been advised of these limitations. The cooperation of the Committee

of American Steamship Lines in our effort to reduce changes under the contract is requested.

The plaintiff does not deny that it received this letter and we can assume that it did receive it and was fully aware of its contents when it executed the contracts involved here.

On December 9, 1963, the plaintiff requested approval of a change to provide for the installation of four constant tension mooring winches, two forward and two aft, on the first group of four ships covered by construction contract No. MA/MSB–19.[5] On January 6, 1964, plaintiff requested approval for a similar change in the second contract. The Board approved the original requested change as eligible for subsidy on January 7, 1964, and so notified the plaintiff on the same date. Thereafter, plaintiff requested the Board to withdraw its request. This was done and on April 14, 1964, the Board cancelled its approval of the change order.

In March 1965, the plaintiff requested a change in each of the twelve ships involving the installation of a propeller-type bow thruster[6] forward and two automatic constant tension mooring winches aft, and that such changes be determined by the Board as eligible for subsidy, which, if approved, would result in an increase cost to the government of $784,168.19. The Board approved the changes, but limited the subsidy participation of the government to only what would be the current full cost as determined by the Board of installing four constant tension mooring winches (estimated at $113,941 increase cost per ship), with any excess cost for substituting a bow thruster for the two forward constant tension mooring winches, or any combination thereof in excess of the cost of four constant tension mooring winches, to be for the owner's (plaintiff's) sole account. This decision of the

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[5] With constant tension winches, the hawsers to be used are wire ropes wound on the winch drums. When moving the ship, an operator reels out the wire by manual winch control, and the wire is manhandled over the side and secured to the pier in the conventional manner. The controls are then set for a desired tension in the hawser, and the wire is automatically reeled in until this tension is developed. If the line tightens or slackens for any reason, the winch lets out or reels in to compensate while maintaining the same tension, without an operator in attendance.

[6] Bow thrusters in this case are propeller devices installed in openings through the bow of ships, below the water line with blades parallel to the length of the ship. The direction of rotation of the propeller permits thrusting the bow sideways to the left or to the right for the purpose of maneuvering in docking operations or to guide the ship in confined waters.

Board was contained in a letter and a telegram dated May 18, 1965, to the plaintiff which stated in pertinent part as follows:

> 1. Granted approval to Lykes Bros. Steamship Company, Inc. to authorize an increased cost change under each of Construction Contract Nos. MA/MSB-19, 30 and 36, to Avondale Shipyards, Inc., for either the installation of a bow thruster forward and two constant tension mooring winches aft, or two constant tension mooring winches forward and two such winches aft, or any combination thereof.
>
> 2. Limited the subsidy participation under Construction-Differential Subsidy Agreement Nos. MA/MSB-20, 31 and 37 to only what would be the current full cost, as determined by the Board, of installing four constant tension mooring winches as a change under contract (preliminarily estimated at $113,941 increased cost per ship) with any excess cost for substituting a bow thruster for the two forward constant tension mooring winches, or any combination thereof in excess of the cost of four constant tension mooring winches, to be for the Owner's sole account.

* * * * *

On the same day, May 18, 1965, the plaintiff authorized the contractor to proceed with the installation of a bow thruster assembly forward and two automatic constant tension mooring winches aft on each of the twelve ships. Thereafter, on May 28, 1965, plaintiff requested the Board to reconsider its request and to approve the government's subsidy participation in full to the extent of the cost of the bow thrusters forward and two constant tension mooring winches aft instead of limiting the subsidy participation to the cost of four constant tension mooring winches. The Board denied the petition and reaffirmed its earlier action on plaintiff's request in an opinion dated August 5, 1965, Docket No. A-18, wherein the Board stated in pertinent part as follows:

> The language of the construction-differential subsidy and construction contracts clearly provides that changes proposed by the operator may be authorized by the Board but approved as "eligible" *for* subsidy or *without* subsidy.
>
> The Board has not directed Lykes to adopt *any* of the combinations of winches and bow thruster; rather, it has advised Lykes what the subsidy consequences of each combination will be. The *rate* provided in the contract

> will be applicable to the amount involved in the "subsidizable" combination * * *. [*Id.* at 3.]
>
> * * * As hereinabove indicated, the contractual provisions for approval by the Board of proposed changes as eligible for subsidy imposes no obligation upon the Board to grant subsidy on any or all of the changes it is willing to permit the owner to make. The Board's willingness to grant flexibility of judgment to the owner does not require it to finance that judgment via subsidy. [*Id.* at 4.]

On August 16, 1965, the plaintiff asked the Secretary of Commerce to review the Board's denial of its request. The Secretary denied plaintiff's request for review on September 2, 1965, without an opinion. The plaintiff filed suit in this court on November 30, 1967, for the sum of $784,168.19 which it claims as damages for an alleged breach of contract by the Board, and which represents the difference between the amount that the Board would have paid as subsidy on account of the bow thruster's change had the Board paid subsidy for the full $2,789,820 cost of installing a bow thruster and two constant tension mooring winches on each of the ships and the amount that the Board did in fact pay as subsidy in accordance with its decision to participate only on the basis of what would have been the cost of installing four constant tension mooring winches. Both the plaintiff and the defendant have moved for summary judgment.

The plaintiff contends that when the Board approved the changes to allow the installation of a bow thruster forward and two constant tension mooring winches aft on each of the twelve ships, this amounted to an approval of these changes as being "eligible for subsidy" within the meaning of the subsidy contracts and the corresponding construction contracts. Accordingly, plaintiff argues, the Board was required to pay the specified percentages of subsidy based on the full cost of the changes and could not pay such percentages on a lesser cost. It points out that after the Board approved the requested changes, the government paid some subsidy on account of the changes but failed and refused to pay the specified percentages on the *full* cost of the changes and that this was a breach of the contracts. The government limited its subsidy payments to the specified percentages of what it

would have cost to install four constant tension mooring winches, two forward and two aft. The plaintiff was required to pay the additional cost of substituting a bow thruster for the two forward constant tension mooring winches on each of the twelve ships. It says that the subsidy contracts required the government to pay the specified percentages on these additional costs of the bow thrusters.

The defendant, on the other hand, contends that the subsidy contracts, as well as the policy guidance letter sent by the Board to the plaintiff on November 3, 1960, clearly authorized the Board to determine the amount of the increase in the cost of the approved changes that was eligible for subsidy and the extent to which subsidy, if any, would be paid. It argues that the Board was authorized by the subsidy contracts to approve the requested bow thruster changes and to limit the percentages of subsidy to such portion of the cost as it found eligible for subsidy. It says further that the determination by the Board of eligibility for subsidy under the contracts extended to price as well as to work, and that the limitation on subsidy participation which the Board imposed in its action of May 18, 1965, was within the authority conferred by the contracts. Furthermore, defendant contends that the determination by the Board that costs of substituting bow thrusters for the forward mooring winches in excess of the cost of four mooring winches would be "for the owner's [plaintiff's] sole account" was tantamount to a determination that such excess costs were not eligible for subsidy participation, and that this decision was authorized by the contracts. It is the position of the defendant that the action taken by the Board was within the power and discretion conferred upon it by the contracts, and, accordingly, there was no breach of contract. We agree with these arguments of defendant for reasons discussed in the following paragraphs.

Both the plaintiff and the defendant urge that our decision in *Sun Shipbuilding & Dry Dock Co. v. United States*, 183 Ct. Cl. 358, 393 F. 2d 807 (1968), controls the decision in the instant case. We agree. Of course, plaintiff and defendant give different reasons for citing that case in support of their respective positions here, as will be shown below.

In the *Sun* case, the contractor (The Sun Co.) sued the government for a breach of contract of a ship construction

contract between it, the government, and the owner, which was practically identical to that involved here. The owner of the ship, American Export Isbrandtsen Lines, Inc., hereinafter called Export, was made a party to the suit and the government asked for judgment over against it for any amount *Sun* might recover against the government. The facts there showed that Export had a construction-differential subsidy contract with the Maritime Subsidy Board for the construction of four ships, which, except for prices and percentages, was practically identical with the subsidy contracts in the instant suit. Export had received the policy guidance letter of November 3, 1960, from the Board, but it was not sent to the Sun Company. During the course of construction of the ships, Export asked the Board to approve changes in the ships so as to allow the installation of refrigerator cargo space in each of them. The Board authorized the changes but limited the subsidy participation in the cost of the changes to what the Board determined the cost would have been had the work been included in the bidding plans and specifications. Export protested this limitation on the subsidy participation by the Board, but authorized the contractor to make the changes. When the government failed to pay subsidy on the full cost of the changes, the contractor filed suit against it for breach of its ship construction contract. Export was made a party as aforesaid and it asserted its construction-differential subsidy contract as a defense to the government's suit over against it.

In Part I of our opinion in that case, we held that the ship construction contract provisions with respect to subsidy participation by the government were ambiguous and could be interpreted so as to support the contentions of both the shipbuilder and the government. This being the case, and since the shipbuilder (The Sun Co.) had not received the 1960 policy guidance letter from the Board and had no advance information as to how the Board would interpret the subsidy provisions, we held that the ambiguity must be decided against the government because it drafted the contract, citing *Bennett* v. *United States*, 178 Ct. Cl. 61, 64, 371 F. 2d 859, 861 (1967). The court there said:

> * * * According to this view, when Marad approved the change in work, it became bound to pay 48 percent of the

total increase in the cost of the work resulting from the change. [*Id.* at 373, 393 F. 2d at 816.]

Judgment was accordingly entered for the shipbuilder against the government.

It is obvious that the plaintiff in the instant case relies on Part I of our opinion to support its claim here. Its confidence in that part of the opinion is misplaced. There we were interpreting the ship construction contract and the rights, duties, and obligations of the shipbuilder and the government thereunder. Here we are concerned with an interpretation of the construction-differential subsidy contracts (not the ship construction contracts) and the rights, duties, and obligations of the owner (not the shipbuilder) and the government under such contracts. It appears that the plaintiff's claim here is not governed by Part I of our opinion in the *Sun* case, but by Part II.

In Part II of our opinion in that case, after pointing out that the owner had argued that the subsidy contract must be interpreted to mean that once the Board approved a change in work, it had to automatically pay 48 percent of the increase in the contract price, or pay none of it, and that it could not pay subsidy on a part of the increased price (which is the same argument the plaintiff makes in the instant case), we said:

> * * * We held that this interpretation of the contract was reasonable as to Sun, but we are required to take a different view with respect to Export. This is partly because the subsidy contract between Export and Marad, to which Sun was not a party, indicates that Marad was given the authority by the contract to determine that certain increases in the contract price were eligible for subsidy and that others were ineligible. This extended to price as well as to work. If this were not so, the provisions in Articles 1 and 2 of the subsidy contract, *supra*, excluding changes approved by Marad as ineligible for subsidy would be meaningless. See *AMP Incorporated* v. *United States*, 182 Ct. Cl. 86, 96, 389 F. 2d 448, 454–55 (1968).
>
> If this is not enough, the question is laid to rest by the policy guidance letter, *supra*, that was sent to Export, among others, by Marad on November 3, 1960, before the instant contracts were executed. That letter specifically stated "* * * in order to establish Federal Maritime

Board *policy guidance* to the Owner [Export here], the Board has agreed in the following: * * * *the Board may approve the changes but limit the subsidy participation to the cost based on the change having been included in the original bid at the time of award.*" (Emphasis supplied.)

When the contracts were executed, Export was familiar with this policy guidance letter and knew the meaning that Marad gave to the various Articles of the contracts. Export knew full well the meaning that Marad intended to convey in the cited Articles of the contract, because the policy guidance letter had fully informed Export. Consequently, when Export received the telegram from Marad of January 28, 1963, *supra*, stating that subsidy participation in cost of change will be based on amount it would have been had work been included in bidding plans and specifications, it knew that Marad was acting in accordance with the contracts and that the contracts authorized Marad to take the action set forth in the telegram.

This court stated in *Cresswell* v. *United States*, 146 Ct. Cl. 119, 127, 173 F. Supp 805, 811 (1959):

If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning. The same is true if he had reason to know what the other party intended. (Cases omitted.) (Emphasis supplied.)

See also *The Franklin Co.* v. *United States*, 180 Ct. Cl. 666, 381 F. 2d 416 (1967); *City of Memphis, Tenn.*, v. *Ford Motor Co.*, 304 F. 2d 845, 849 (6th Cir. 1962).

In our opinion, Export knew the meaning Marad intended to convey by the provisions of the contracts at the time they were executed and was bound by that meaning. At least it had reason to know what Marad intended. [*Id.* at 375–76–77, 393 F. 2d at 817–18.]

We held further in that case that even if the contracts were ambiguous, their interpretation by the owner (Export) was unreasonable and that of the Board reasonable because "we can look to the policy guidance letter [of November 3, 1960] to determine their meaning." We said, with reference to the Board's interpretation of the contracts:

* * * It [the Board] was correct in its interpretation of the contracts as imposing liability upon it for only 48 percent of the increased contract price which it approved *to the extent* or *insofar as eligible* for construction-differential subsidy because of the change in work. [*Id.* at 377, 393 F. 2d at 818.]

We pointed out that if Export was uncertain as to the Board's construction of the contracts before they were executed, it was put on inquiry by the 1960 policy guidance letter, and that it must be assumed that it knew and acquiesced in the proposition it would be required to pay all of the increase in price due to the changes over and above the amount stated in the Board's telegram to be eligible for subsidy.

In the *Sun* case, judgment was entered in favor of the government against the shipowner (Export).

We conclude that our holding in Part II of the *Sun* case is dispositive of the case before us. Everything we said there could be said here because it is equally as applicable to the instant case.

The plaintiff attempts in various ways to distinguish its case from Part II of the *Sun* case. In the first place, it contends that the 1960 policy guidance letter was not applicable here because the Board did not limit its subsidy participation to the specified percentages of what it would have cost if the bow thruster changes had been included in the original bid at the time of the award as stated in the 1960 letter. We do not think this is a valid argument. The importance of the 1960 letter was that it put the plaintiff on notice that the Board interpreted (or would interpret) the subsidy participation provisions of the contracts so as to allow it to approve changes but allow it to limit subsidy participation to a percentage of less than the full cost of changes.

A similar argument was made by plaintiff with reference to the limitation in the 1960 policy letter on subsidy if changes exceeded 2 percent of the cost of the vessel, unless the Board, in exceptional cases, raised the cost settlement to the level it deemed warranted by the circumstances.[7] The plaintiff says the Board did not base its subsidy limitation on this 2 percent provision. Here again, it must be said that the policy guidance letter put the plaintiff on notice that the Board interpreted

[7] The facts here show that at the time plaintiff requested approval of the changes, the Board had already approved changes amounting to 4.54 percent of the cost of the ships under contract MA/MSB-19, and 4.37 percent of the cost of ships under contract MA/MSB-30, and 0.18 percent of the cost of ships under contract MA/MSB-36, and the bow thruster change on MA/MSB-36 ships would exceed the 2 percent limitation.

the subsidy contracts in such a way as to allow it to approve changes and at the same time limit its subsidy participation to a percentage of a lesser amount than the full increase in cost due to the changes: The plaintiff signed the contracts with this knowledge. As a matter of fact, the Board did not give any reason for its action nor state on what basis it was limiting its subsidy participation in its decision of May 18, 1965. It may have had more than one valid reason, including the 2 percent limitation (which alone would have been sufficient), but that is not material. The important fact is that it reserved unto itself the right and power to limit subsidy participation to an amount less than the cost of the changes and in effect so advised the plaintiff before the contracts were signed. The plaintiff executed the contracts with this knowledge and is deemed to have acquiesced in the arrangement.

The plaintiff says that the Board's limitation of its subsidy participation is invalid because it is based on the cost of installing four mooring winches on each ship when the plaintiff did not ask for them but asked for a bow thruster and two mooring winches instead. It is clear that the Board was merely using the cost of installing the four mooring winches (which plaintiff originally requested and then cancelled the request) for the purpose of arriving at a price which it determined was eligible for participation subsidy. The Board was willing to approve the bow thrusters and two mooring winches per ship as a change if the plaintiff desired to pay the balance of the cost of the change over and above the cost of installing four mooring winches per ship.

The next argument of the plaintiff is that the 1960 policy guidance letter from the Board should not be material here because it had been superseded by other and later policy statements issued by the Board. It points to one such statement in particular, namely, a Board "policy" published in "proposed" form on March 2, 1965 (30 Fed. Reg. 2681) that was adopted on September 9, 1965, and published on September 15, 1965 (30 Fed. Reg. 11756) which stated:

> * * * Other nonstandard equipment or shipbuilding components shall be eligible for CDS, [Construction-differential subsidy] only if * * * it can be demonstrated with reasonable certainty that the added

> investment will produce a return to the owner of at least 10 percent per annum after taxes over the life of the investment. * * * .

Plaintiff alleges that its requested bow thrusters met the requirements of this statement and were therefore eligible for subsidy. It says its position in this regard is further supported by the fact that on June 1, 1965, the Board issued "Standard Specifications for Cargo Ship Construction" which included specifications for bow thrusters. We do not think this argument is valid for several reasons, namely, (1) The alleged "new policy" was adopted after the contracts in issue here had been executed; (2) The request of plaintiff for the bow thruster change had already been denied full subsidy participation by the Board (May 18, 1965); (3) It (the new policy) was to operate prospectively and not retroactively, and (4) If it was a "new policy" it was in addition to that set forth in the policy guidance letter of November 3, 1960, and not in lieu of it. There is no evidence that the 1960 policy was ever repealed, cancelled, withdrawn or revoked. Consequently, we must assume that it was in force and applied to this case where relevant.

Another contention of the plaintiff is that the Board denied it full subsidy participation on the bow thrusters because of a unilateral "moratorium" declared by the Board on changes in vessels being constructed under subsidy contracts because of a shortage of funds. Plaintiff says this was arbitrary, unauthorized, an abuse of discretion, and invalid. It points to the fact that the Board adopted such a moratorium on March 24, 1965, "for the remainder of the current fiscal year," and plaintiff was advised of it by letter dated April 1, 1965. On July 28, 1965 (after the end of the previous fiscal year on June 30, 1965), the Board extended the moratorium "until fiscal year 1966 appropriations are finally determined, at which time the issue will be reexamined." The plaintiff complains that even after the 1966 appropriations for the Board became final and there was no longer a shortage of funds, the Board still refused to reconsider its bow thruster request and continued to deny it. The defendant denies that the Board based its decision on the moratorium and says that even if it had done so its action would have been authorized by the

contracts. We do not have to decide this question, although a shortage of funds might well be a valid reason to limit subsidy participation under the contracts. The Board did not state in its denial of plaintiff's request on May 18, 1965, that it was doing so because of the moratorium. We find no evidence that it based its decision on the moratorium. We conclude that the action of the Board was not arbitrary nor an abuse of discretion, but was a valid exercise of the authority conferred upon it by the contracts.

The case has been well briefed and forcefully argued by counsel for both parties, and this has been of great assistance to the court. It is our opinion, however, that the law is with the defendant for all of the reasons stated herein.

Accordingly, plaintiff's motion for summary judgment is denied, and that of the defendant is granted, and plaintiff's petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

171-64	JOHN G. VANN AND BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA	v.
274-64	DECCA LIMITED	THE
399-67	LYKES-YOUNGSTOWN CORPORATION and LYKES BROS. STEAMSHIP CO., INC.	UNITED
347-68	SIDNEY GELB	STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

These cases come before the court on motions for reconsideration, modification, clarification of the court's decision, rehearing, and for further relief under Rules 151 and 152 of the Rules of this court and on consideration thereof,

IT IS ORDERED this 17th day of April, 1970, that said motions be and the same are denied as follows:

171-64 John G. Vann and Birmingham Fire Insurance Company of Pennsylvania. Defendant's motion for reconsideration, modification, or clarification of the court's decision.

274-64 Decca Limited. Plaintiff's motion for rehearing under Rule 151.

399-67 Lykes-Youngstown Corporation and Lykes Bros. Steamship Co., Inc. Plaintiffs' motion for rehearing.

347-68 Sidney Gelb: Plaintiff's motion for reconsideration.

BY THE COURT

/s/ Wilson Cowen
Chief Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1970

LYKES-YOUNGSTOWN CORPORATION and
LYKES BROS. STEAMSHIP CO., INC., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

ROBERT V. ZENER,
JAMES C. HAIL, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 399

LYKES-YOUNGSTOWN CORPORATION and
LYKES BROS. STEAMSHIP CO., INC., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1A-17A) is reported at 420 F.2d 735.

JURISDICTION

The judgment of the Court of Claims was entered on January 23, 1970. A timely motion for rehearing was denied on April 17, 1970 (Pet. App. 18A-19A). The petition for a writ of certiorari was filed on

July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly upheld the Maritime Subsidy Board's decision approving changes in vessels being constructed for petitioner but providing subsidy for less than the full cost of such changes.

STATEMENT

Petitioner Lykes-Youngstown Corporation ("petitioner") and its wholly-owned subsidiary, Lykes Bros. Steamship Company, own and operate ocean-going cargo ships between ports of the United States and foreign countries throughout the world. These shipping operations are conducted under an operating-differential subsidy contract which petitioner and the United States entered into pursuant to Title VI of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1171-1183.[1] Under that contract, in return for such subsidy petitioner agreed to operate each of its vessels on particular trade routes for a specified number of voyages annually and to replace its existing vessels according to a specified schedule with new vessels constructed in United States shipyards (Ex. 1).[2] This latter obligation was conditioned upon the

[1] The 20-year contract was executed for the United States by the Federal Maritime Board, the predecessor of the Maritime Subsidy Board. It became effective on January 1, 1958 (Pet. App. 2A).

[2] "Ex." refers to numbered exhibits contained in petitioner's exhibit volume filed in the Court of Claims.

provision by the United States of construction-differential subsidies, pursuant to Title V of the Act, as amended, 46 U.S.C. 1151-1161 (Ex. 1), in order that the higher cost of construction in domestic shipyards would be equalized with the lower cost of construction in foreign shipyards (Pet. App. 2A).[3]

In 1963 and 1964 petitioner, as owner, the Maritime Subsidy Board, and Avondale Shipyards, as contractor, entered into contracts for the construction of twelve new vessels. Divided into three groups of four vessels, each group was covered by two simultaneously-executed contracts—a construction contract among the three parties and a construction-differential subsidy contract between petitioner and the Board (Exs. 2-8). Under Article 4(b) of the general provisions of the construction contracts petitioner, with the approval or authorization of the Board, was permitted to direct changes in the plans and specifications of the vessels under construction (Ex. 8). Each construction contract allocated any increase in the contract price between petitioner and the Board on the following bases:

> The Board shall pay the Contractor * * * 49.8% and the Owner shall pay the Contractor * * * 50.2% of *. * * the net increase in Contract Price, * * * for changes in the contract work approved by the Board as eligible for construction-differential subsidy * * *.

---

[3] As the Court of Claims noted (Pet. App. 2A), the construction-differential subsidy is for the benefit of domestic shipbuilders rather than of domestic ship owners and operators.

(Ex. 2, Article IV(a)(ii).) Similarly, the construction-differential subsidy contracts provided:

> ARTICLE 1. *Grant of Construction-Differential Subsidy.* (a) The Board grants, in compliance with the provisions of Sections 501 and 502 of the Act, a construction-differential subsidy to aid in the construction of the Vessels by the Owner in the total sum of the following:
>
> * * * * *
>
> (ii) A sum which shall be equal to 49.8% of the net increase in the Contract Price * * * for changes in the contract work pursuant to Article 4 of the General Provisions, * * * (exclusive of changes in the national defense features, and *exclusive of changes of the Owner approved by the Board as ineligible for construction-differential subsidy*) approved by the Board as eligible for construction-differential subsidy * * *.
>
> * * * * *
>
> (b) In no event shall the grant under this Article 1 exceed 55% of the total cost of constructing the Vessels (exclusive of the cost of the national defense features plus changes applicable thereto, and *exclusive of changes approved by the Board as changes not eligible for construction-differential subsidy*) as determined by the Board. [Emphasis supplied]

(Ex. 3; see also Article 2(b).)[4]

---

[4] The second and third pairs of contracts specified that the Board would pay 53.9 percent and 55 percent, respectively, of any net increase in the contract price resulting

In 1960, prior to execution of these contracts, the Chairman of the Federal Maritime Board had sent a policy guidance letter to the Committee of American Steamship Lines, of which petitioner was a member, advising that, save for exceptional cases, for any authorized changes in plans and specifications there would be an overall limitation on the government subsidy of two percent of the single vessel contract price.[5]

The dispute involved in this case arose out of requests by petitioner for Board approval of certain plan and specification changes as eligible for subsidy. In December 1963 and January 1964, respectively, petitioner requested such Board approval of the installation of four constant tension mooring winches, two forward and two aft, on the first and second groups of vessels under construction. The Board approved the initial request as eligible for subsidy in early January of 1964, and so notified petitioner. Petitioner, however, informed the Board that it wished to withdraw its request, and the Board cancelled its approval of the changes. (Exs. 10-13; Pet. App. 6A-7A.)

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from changes approved as eligible for subsidy. In all other respects here revelant, the three pairs of contracts were identical.

[5] The letter is reproduced in pertinent part in the Court of Claims opinion (Pet. App. 6A-7A) and in whole in an Appendix to this brief, *infra* at pp. 15-16. The Board's policy, as expressed in its 1960 letter, was reaffirmed in Order No. 55 issued by the Acting Maritime Administrator in 1962 (27 Fed. Reg. 10335) (See note 8, *infra*).

In March of 1965 petitioner requested Board approval as eligible for subsidy of the installation of a propeller-type bow truster forward and two constant tension mooring winches aft on each of the twelve vessels, at an increased cost to the government of $784,168.19 over the cost of installing four constant tension mooring winches on each of the twelve vessels (Ex. 16; Pet. App. 7A, 9A). In May of 1965 the Board approved the changes but limited the subsidy participation to its estimate of the current full cost of installing four constant tension mooring winches, with any excess cost for substituting a bow thruster for the two forward constant tension mooring winches to be borne by petitioner (Ex. 30-32). The reasons for this decision were fully indicated in the letter transmitting the decision to petitioner (Ex. 32).[6] After receiving notification of the Board's decision, petitioner arranged to pay the shipyard that portion of the increased contract price not approved for subsidy by the Board and directed it to make the changes (Ex. 34; Pet. 4A, 8A).

Thereafter, petitioner requested the Maritime Subsidy Board to reopen the matter and to remove the limitation on subsidy (Ex. 37). Denying the request and affirming its earlier decision, the Board ruled:

> "The language of the construction-differential subsidy and construction contracts clearly provides that changes proposed by the operator may be authorized by the Board but approved as "eligible" *for* subsidy *or without* subsidy.

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[6] The transmittal letter is reproduced in an Appendix to this brief, *infra* at pp. 17-22.

> The Board has not directed Lykes to adopt *any* of the combinations of winches and bow thruster; rather, it has advised Lykes what the subsidy consequences of each combination will be. The *rate* provided in the contract will be applicable to the amount involved in the "subsidizable" combination. * * *
>
> * * * [T]he contractual provisions for approval by the Board of proposed changes as eligible for subsidy imposes no obligation upon the Board to grant subsidy on any or all of the changes it is willing to permit the owner to make. The Board's willingness to grant flexibility of judgment to the owner does not require it to finance that judgment via subsidy.

(Ex. 44, at 3, 4.) The Acting Secretary of Commerce denied petitioner's request that the Secretary of Commerce review the Board's decision (Exs. 47, 49).

Petitioner then instituted the present action in the Court of Claims seeking $784,168.19 as damages for breach of contract by the Board. Petitioner moved for summary judgment, contending that under the construction-differential subsidy contracts the Board was required to pay the specified subsidies on the full cost of installing the bow thruster, and could not limit the subsidy to "eligible" changes (see Brief filed on Feb. 17, 1969 in Ct. of Cl.; Pet. App. 9A-10A). The Court of Claims denied petitioner's motion and granted the government's cross-motion for summary judgment (Pet. App. 17A).

The court cited as dispositive *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 393 F. 2d 807, in

which, in circumstances virtually identical to those here, a shipyard sued the government on the construction contract for failure to pay the subsidy on the total cost of all the changes it had made at the direction of the shipowner and in which the government sought indemnity from the shipowner. The court observed that in Part I of its *Sun* opinion it had held the government liable to the shipyard because the construction contract provisions that the government had drafted were ambiguous and because the shipyard had *not* received notice of the Board's 1960 policy guidance letter which, by placing a 2 percent limit on subsidies of contract changes, clarified the construction contract's ambiguities (Pet. App. 11A-12A). But the court pointed out that in Part II of that opinion it had held the shipowner liable for indemnification of the government because the subsidy contract authorized the Maritime Administration to determine that certain increases in the contract price resulting from approved changes were eligible for subsidy and that others were not, and because the shipowner *had* received notice of the Board's 1960 policy guidance letter,[7] which either clarified any ambiguities in the subsidy contract or put the shipowner on notice to seek clarification from the Board (Pet. App. 12A-14A). Rejecting petitioner's attempts to rely upon Part I and to distinguish Part II of its *Sun* opinion, the court concluded that

[7] As here, the shipowner in *Sun* received notice of the 1960 letter through its membership in the Committee of American Steamship Lines, to which it had been sent (183 Ct. Cl. at 362-63; 393 F. 2d at 809-10).

its Part II ruling was equally applicable to petitioner (Pet. App. 14A-16A).

ARGUMENT

1. Petitioner argues that the Court of Claims is defeating the uniform interpretation of standard-form government contract provisions by construing such provisions against shipowners (including petitioner) here and in *Sun Shipbuilding* and in favor of the shipyard in the latter case.

The subsidy contracts provide that the Board may approve a change without agreeing to subsidize it; the Board's obligation to pay arises only when an approved change is found to be eligible for subsidy. The shipowner in *Sun Shipbuilding* did not dispute this, 393 F. 2d at 807, and we do not understand petitioner to do so here. Rather, petitioner argues that the Board's transmittal letter, in which it agreed to subsidize only the cost of two tension mooring winches forward plus two aft but approved the substitution of a bow thruster for two forward winches, together with the Board's later subsidy payments for four winches when only a bow thruster and two winches aft were installed, amounted to approval of a bow thruster as eligible for subsidy; that the bow thruster was only partially subsidized because it was more expensive than the two tension mooring winches it replaced; and that the Board therefore violated the contracts since it had no authority to subsidize less than the full cost of a change approved as eligible for subsidy. Petitioner's interpretation of the contract with respect to the Board's authority is not

novel; it is identical to that advanced by the shipowner in *Sun*. The Court of Claims properly rejected that interpretation in *Sun* and, consistent with that opinion, followed the same course here.

While the contract terms in both cases may not have been perfectly clear, any doubt that the Board could pay subsidy on only part of the increased price resulting from an approved change is laid to rest by the Board's policy guidance letter of 1960, which predated all the contracts. This letter explicitly stated that, save for exceptional cases, there would be no subsidy for changes exceeding 2 percent of the original contract price—a policy reaffirmed in 1962 by the Maritime Administrator's Order No. 55,[8] which was also published prior to the execution of the contracts here. In its transmittal letter limiting the subsidy to four tension mooring winches the Board specifically referred to this policy[9] and had good

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[8] The Maritime Administrator's Order No. 55, 27 Fed. Reg. 10355 (Oct. 23, 1962), stated in pertinent part:

> Sec. 2. *Specific authorities redelegated to the Chief, Office of Ship Construction.* 2.01 Authority to approve changes in contract plans and specifications of ships constructed, reconstructed, converted, reconverted or reconditioned under construction-type contracts with the Maritime Administration, and authority to approve changes in cost and delay in delivery, if any, provided such changes do not result in a cost change in excess of $50,000 in any one instance and *provided the aggregate cost of the changes does not increase the cost of the ship by more than 2 percent of the single vessel contract price.* [Latter emphasis supplied]

[9] The Board stated that it had:

> 5. Determined that the limitation of the authority to the Chief, Office of Ship Construction to approve

reason to do so: the 2 percent limitation had already been exceeded on two of the contracts and, as the Court of Claims noted (Pet. App. 14A n.7), would have been exceeded on the other if the full cost of the bow thruster had been subsidized.

In this light the court's construction of these standard-form contract provisions was conducive to uniformity. Ambiguities have been consistently resolved in favor of the Board's interpretation when the owner has had notice of the Board's view prior to entering into the contract.[10]

---

changes under contract and change settlements remain at the percentage of the single vessel contract price as previously established by Administrator's Order No. 55 as modified by Board action of December 3, 1963, exclusive of the change authorized pursuant to this action.

(Ex. 32, p. 2.)

This 2 percent subsidy limitation was also specifically cited, in connection with Board deliberations on petitioner's requested changes, in the following memoranda from the Chief, Office on Ship Construction, to the Maritime Subsidy Board and excerpts from the official minutes of the Board: Ex. 15, pp. 10-11 (March 4, 1965 memorandum); Ex. 18, p. 2, paragraph 4 (minutes); Ex. 19, pp. 5-7 (March 24, 1965 memorandum); Ex. 21, paragraph 2 (minutes); Ex. 28, p. 8 (April 29, 1965 memorandum); Ex. 30, p. 2 paragraph 5 (minutes of Board decision).

[10] Petitioner contends that its membership in the Committee of American Steamship Lines, to which the Board's 1960 policy guidance letter was sent, was not sufficient to give it notice of the Board's interpretation of these contract provisions. But as the court pointed out (Pet. App. 6A-7A), petitioner did not deny that it had received the letter; and it makes no such denial now. From this, the court inferred that petitioner had received the letter and "was fully aware of its contents when it executed the con-

Petitioner argues that the court's decision frustrates the purpose of Title V of the Merchant Marine Act of 1936, to promote the domestic shipbuilding industry. Title V of the Act provides for government subsidy of only the original cost of having a vessel constructed in a domestic shipyard. That purpose was fulfilled here when the Board, pursuant to the construction-differential contracts, granted subsidies of the original vessel costs. The Act does not provide for government subsidy of *changes* in the original contract plans, requested by the shipowner after the construction contracts have been awarded. Rather, it is the Board, in the exercise of its discretion under the Act, which has undertaken to provide subsidies of requested contract changes—changes that, unlike the original contract, are not subject to competitive bidding. But the Board, both as a matter of policy and of contract terms, has reserved the right to limit such subsidies, of which the petitioner was fully aware. Thus, in limiting the subsidy for the changes requested by petitioner, the Board was merely exercising its authority under the contracts.

2. Petitioner attacks as inadequate the Court of Claims' review of the Board's decision to limit the

---

tracts involved here" (Pet. App. 7A). On the basis of these inferences the court concluded that, should petitioners not have been aware from the contract provisions themselves that the Board had reserved the right to pay subsidy on only part of the increased price from a change approved as eligible for subsidy, then the Board's 1960 letter and the 1962 order put petitioner on notice of that fact (Pet. App. 12A-14A).

subsidy of the contract changes. This attack must fail.

It has long been settled that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch* v. *United States*, 292 U.S. 571, 579; *Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 184. With regard to the Board's action under the contracts here, the court specifically ruled that:

> This important fact is that it reserved unto itself the right and power to limit subsidy participation to an amount less than the cost of the changes and in effect so advised the plaintiff before the contracts were signed. The plaintiff executed the contracts with this knowledge and is deemed to have acquiesced in the arrangement. * * *
>
> * * * We conclude that the action of the Board was not arbitrary nor an abuse of discretion, but was a valid exercise of the authority conferred upon it by the contracts.

(Pet. App. 15A, 17A.) The Board's actions were fully considered by the court below, and there is no occasion for further review.

Finally, petitioner asserts that the grant of summary judgment in favor of the United States was improper because there were factual issues requiring resolution. But petitioner itself first moved for summary judgment below, evidently believing then that there were no remaining factual issues. Furthermore, the principle issue in the case concerned the legal effect of the Board's 1960 letter with respect to the

contract terms. Since petitioner never denied receiving this letter, no genuine issues of material fact were presented. The court having resolved the legal issues in the government's favor, summary judgment was an appropriate means of disposing of the case.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
JAMES C. HAIR, JR.,
Attorneys.

September 1970

APPENDIX

Nov. 3, 1960

Committee of *American Steamship Lines*
1000 Connecticut Avenue, N. W.
Washington, D. C.

Gentlemen:

There appears to be a growing tendency upon the part of some operators to request substantial changes in design for new ships after construction contracts are awarded.

Cargo ships currently being constructed under the replacement program represent considerable effort on the part of the design agent and the operator's staff. They are generally fitted out with more elaborate equipment than their European counterparts with the view of reducing labor or cargo handling costs. This is proper when economically justified.

During the recent weeks, the Board, in connection with the cargo ship replacement program, has acted on several Changes Under the Contract involving considerable sums of money in which the Government subsidy participation is requested. In reviewing these several changes, the Board considered that the Owners' and the Government's interests are best served if modifications be reduced to an absolute minimum. As a normal procedure it is expected that the design will be finalized before requesting bids. Modifications made after award do not have the full advantages of competitive bidding.

On the basis that the ship owner is mutually interested in reducing shipbuilding costs and in order to establish Federal Maritime Board policy guidance to the Owner, the Board has agreed in the following:

1. In shipbuilding contracts involving the payment of Government subsidy, there will be an overall limitation of 2% of the single vessel contract price in connection with the authorization of changes under contract and approved cost settlements.

2. In exceptional cases and upon consideration of pertinent facts, the Board may during the construction of each vessel raise the limit of authority and approve cost settlements to the level it deems to be warranted by the special circumstances.

3. Where major changes are involved, even within the 2% limitation, and when such changes are warranted, the Board may approve the changes but limit the subsidy participation to the cost based on the change having been included in the original bid at time of award.

The Maritime Administration staff has been advised of these limitations. The cooperation of the Committee of American Steamship Lines in our effort to reduce changes under the contract is requested.

Sincerely yours,

RALPH E. WILSON
RALPH E. WILSON
Chairman,
Federal Maritime Board

May 18, 1965

Mr. Frank A. Nemec
President
Lykes Bros. Steamship Company, Inc.
P. O. Box 50998
New Orleans, Louisiana 70150

Dear Mr. Nemec:

Reference is made to your letter of March 12, 1965, to Mr. L. C. Hoffmann, Chief, Office of Ship Construction, as well as subsequent communications between Lykes Bros. Steamship Company, Inc., and the Maritime Administration, respecting your request for change order approval for the installation of a bow thruster forward and two constant tension winches aft on each of twelve ships, Design C4-S-66a (First, Second and Third Groups), Contracts MA/MSB-19, 30 and 36. After careful consideration of the foregoing subject the Board, by unanimous vote, at a meeting held on this date, took the following actions.

1. Granted approval to Lykes Bros. Steamship Company, Inc., to authorize an increased cost change under each of Construction Contract Nos. MA/MSB-19, 30 and 36, to Avondale Shipyards, Inc., for either the installation of a bow thruster forward and two constant tension mooring winches aft, or two constant tension mooring winches forward and two such winches aft, or any combination thereof.

2. Limited the subsidy participation under Construction-Differential Subsidy Agreement Nos. MA/MSB-20, 31 and 37 to only what would be the current full cost, as determined by the Board, of installing four constant tension mooring winches as a change under contract (preliminarily estimated at

$113,941 increased cost per ship) with any excess cost for substituting a bow thruster for the two forward constant tension mooring winches, or any combination thereof in excess of the cost of four constant tension mooring winches, to be for the Owner's sole account.

3. Noted the Contractor's request for an extension of the contract delivery dates by an additional 30 days but withheld extending the contract delivery dates until after actual deliveries at which time delay caused by the subject work will be determined.

4. Conditioned the foregoing authorization for construction-differential subsidy participation upon the understanding that no additional construction-differential subsidy will be authorized under any of Construction Contract Nos. MA MSB-19, 30 and 36, Construction-Differential Subsidy Agreement Nos. MA-MSB-20, 31 and 37, or under any subsequent reconstruction and reconditioning subsidy differential construction contracts for the installation of constant tension mooring winches upon any of the subject ships, as may be necessary in accordance with future Board or Company action, in excess of the construction-differential subsidy participation authorized by this action.

5. Determined that the limitation of the authority of the Chief, Office of Ship Construction to approve changes under contract and change settlements remain at the percentage of the single vessel contract price as previously established by Administrator's Order No. 55 as modified by Board action of December 3, 1963, exclusive of the change authorized pursuant to this action.

As you may know, the Maritime Subsidy Board has pursued a policy of authorizing, to the extent possi-

ble within the scope of available funds, a mechanization program in respect to any and all change orders which might have the present or ultimate effect of reducing labor input. In this respect the term "labor input" may be defined as "man hours of labor or work performed in executing all duties required aboard ship in the maintenance and operation of the subject vessel in a safe and efficient manner". In the pursuit of this program the Board recognizes that while a desirable mechanization feature might offer no immediate results in the actual reduction of crew the installation, if it possesses the ultimate effect of reducing labor input, may result in a reduced manning scale as a consequence of normal labor-management agreement negotiated at some future date.

In light of the foregoing, the Board gave careful consideration to the question, "What relationship, if any, both direct and indirect, do bow thrusters have to shipboard manning, with or without constant tension mooring winches?" In considering this question the Board reached the following conclusions:

(1) A bow thruster by itself, without constant tension winches, either eliminates or reduces tug usage and therefore reduces the overall need for men standing by at the forward end to handle tug lines. Since docking is the ship operation which requires the maximum number of men, a bow thruster simplifies this operation by working the ship close in to the dock without the need for long lines thus reducing work of the deck crew involved.

(2) A bow thruster or two constant tension winches forward may be considered generally equivalent to each other in reducing the number of deck crew needed forward. Either a combination of a bow thrusfer forward and two constant winches aft

or two constant tension winches forward and two constant tension winches aft without a bow thruster would require only a ten man unlicensed deck crew.

(3) If no constant tension winches were installed either forward or aft, but only a bow thruster, it is considered that one man in addition to the ten man deck crew would be required.

(4) If no bow thruster or constant tension winches were installed, either forward or aft, it is considered that two men in addition to the ten man deck crew would be required.

(5) If a combination of a bow thruster forward and two constant tension winches aft were installed as proposed by Lykes, the addition at a later date of two constant tension winches forward could possibly reduce shipboard manning below the ten man unlicensed deck crew if the Coast Guard were to relax their present rules of requiring 6 A. B. and 3 ordinary seamen for a cargo ship crew.

In addition, the Board in realization of the fact that a bow thruster may accomplish (a) reduced tug charges, (b) less strenuous work for the crew, (c) faster tie-up at dock, and (d) reduction in ship damage, gave consideration to the question, "What relationship, if any, both direct and indirect, do bow thrusters have to shipboard manning in a combination installation of the type proposed by Lykes Bros. Steamship Company, Inc. (bow thruster forward and two winches aft)?"

In considering this matter the Board concluded that a bow thruster in conjunction with two constant tension winches aft would, under prevailing conditions, permit a ten man unlicensed deck crew—one man less than if there were a bow thruster only,

without constant tension winches aft, and two men less than if there were no bow thruster or constant tension winches. In relation to overall unlicensed deck manning, two constant tension winches forward instead of a bow thruster would accomplish as much as the bow thruster in regard to overall shipboard manning. Again, from an operations viewpoint, the two constant tension winches would result in greater work saving than a bow thruster, with special reference to line handling after the ship has been docked and tied up.

On the basis of the foregoing, as well as other considerations entering into the Board's deliberations, the Board concluded that construction-differential subsidy participation should be limited to the cost of four constant tension mooring winches, as indicated in the actions of the Board set forth above. Moreover, the Board decided that since the installation of four constant tension mooring winches would have the ultimate effect of reducing labor input and at some future date could possibly reduce shipboard manning below the ten man unlicensed deck crew, authorization for Federal expenditure in the form of construction-differential subsidy should be limited as determined by the Board, and at the same time grant the Operator the choice of installing the system which he feels is most desirable. Accordingly, the Board placed a limitation on your current request for change order approval with subsidy participation not to exceed the cost of four constant tension mooring winches for each vessel, and with the further understanding that no additional construction-differential subsidy would be authorized for any future change orders relating to the possible installation of additional constant tension mooring winches.

Your attention is invited to the provisions of Section 7 of Department of Commerce Order No. 117, effective August 12, 1961, and revised April 9, 1962.

Please indicate your acceptance of the above action by signing and returning the enclosed copy of this letter, noting the date of signing thereon.

Sincerely yours,

s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

cc: Mr. Bartle

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 399

LYKES-YOUNGSTOWN CORPORATION and
LYKES BROS. STEAMSHIP CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY TO BRIEF IN OPPOSITION

ODELL KOMINERS
J. ALTON BOYER
MICHAEL JOSEPH
500 Tower Building
Washington, D.C. 20005
Counsel for Petitioners

Of Counsel:
KOMINERS, FORT,
SCHLEFER & BOYER

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Respondent's brief in opposition to the petition, as with defendant's briefs below, is largely unresponsive to the points presented by petitioner.

I

The first point of the petition is that the decision below interpreting a standard-form contract clause one way for certain contractors and another way for others raises significant issues respecting the uniform interpretation of Government

contracts which should be reviewed by this Court. Respondent does not answer this point, except to make the unsupported assertion that the lower court's interpretation of the contract language "was conducive to uniformity" (Br. 11), an assertion illogical on its face.

Respondent's first point (Br. 9-11) is essentially a defense of one of the two conflicting contract interpretations of the court below. Its argument is that the court correctly upheld the Board's interpretation against the owner in this case because a 1960 letter received by a trade association three years prior to the contracts in suit stated a policy that the Board would not pay subsidy for changes exceeding 2% of the contract price, that that policy was reaffirmed by the Board in 1962, and, respondent further implies, that in acting upon petitioner's request in 1965 the Board invoked that policy as a reason for its action (Br. 10).

The circumstances surrounding the 1960 letter are outlined at pages 11-12 of the petition and cast grave doubt upon its applicability to the present contracts in any event. Moreover, it is highly questionable whether the "2% policy" expressed therein would ever have put anyone on notice that the Board might act upon a change request in the manner it did here. The letter stated that aside from exceptional cases (see Brief in Opposition, p. 16):

> [i]n shipbuilding contracts involving the payment of Government subsidy, there will be an overall limitation of 2% of the single vessel contract price in connection with the authorization of changes under contract and approved cost settlements.

This statement might have put one on notice that the Board claimed the right to find a requested change ineligible for subsidy where the aggregate cost of changes previously found eligible for subsidy amounted to 2% of the contract price. It did not even remotely suggest, however, that the Board might also, after finding a requested change eligible for subsidy, pay its share of subsidy on the basis of a dif-

ferent, hypothetical change.[1] Nor did it suggest that subsidy might be limited, as it was here, for reasons having nothing whatever to do with whether or not the cost was within 2% of the contract price.

Contrary to respondent's statement, the Board did not in 1962 or any other time of which petitioner is aware reaffirm a policy limiting subsidy for changes to those within 2% of the contract price, and the court below did not so hold. Administrator's Order No. 55, 27 Fed. Reg. 10335, quoted in material part at note 8, page 10 of respondent's brief, was merely a *redelegation of authority* from the Board to a staff member which permitted the staff member to approve contract changes under $50,000 so long as their aggregate cost did not exceed 2% of the contract price. Authority to approve all other changes remained in the Board. Approval of all changes under the contracts was required whether or not subsidy for their cost was requested (Ex. 8, p. 4), and the redelegation of a portion of this authority made no reference to subsidy or eligibility for subsidy. Administrator's Order No. 55 was an internal, administrative order stating who had authority to approve changes; it did not purport to set forth any criteria by which changes should or would be approved or found eligible for subsidy.

Respondent's further suggestion that the Board relied upon a policy of limiting subsidizable changes at 2% of the contract price in its action as to petitioner is not only incorrect, so far as the record shows, but is also contrary to defendant's flat statement below that "[d]efendant does not contend that the Board posited its action . . . upon" that

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[1] The implication created by respondent's brief (p. 5), that the bow thrusters change and the hypothetical "four mooring winches" change were somehow related, is incorrect. Bow thrusters perform different functions from mooring winches. See Exs. 71 and 72.

The only relationship between the bow thrusters change and the earlier proposed mooring winches change referred to by respondent is that the Board determined to pay subsidy for the former upon the basis of the cost of the latter.

policy. See defendant's brief below filed July 24, 1969, pp. 9-10. In its letter of transmittal to petitioner in 1965, the Board referred to Administrator's Order No. 55 only to make clear that the cost of the bow thrusters change was not to be included in determining when the staff member had reached the limit of his redelegated authority in approving changes. See Brief in Opposition, p. 10, note 9.[2] Respondent's imprecision contributes only confusion.

Respondent claims (Br. 12) that the Government's failure to pay the contract-specified rate of subsidy for the full cost of a change found to be eligible for subsidy does not frustrate the purpose of Title V of the Merchant Marine Act because the Act provides for subsidy for "only the original cost of having a vessel constructed in a domestic shipyard" and not for the cost of changes in the original contract work. No statutory language is referred to and none supports this statement. Title V by its terms is designed to provide a subsidy "to aid in the construction of . . . new vessel[s]"[3] and its legislative history makes clear that it was intended to provide a subsidy representing "the difference between the American and foreign *cost* of building" such vessels.[4] The cost of construction of something so complex as a vessel, as the Board has long recognized, invariably involves changes in the contract work, particularly where, as here, new technological developments appear during the construction process.[5] Petitioner does not under-

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[2] The various memoranda and minutes referred to in note 9, at p. 10 of respondent's brief, similarly refer to the redelegation of authority to approve changes, not to any limitation upon their eligibility for subsidy.

[3] Section 501(a), 46 U.S.C. §1151(a).

[4] S. Rep. No. 1721, 74th Cong., 2d Sess. (1936) 14 (emphasis supplied).

[5] More than thirty years ago it was recognized that the "changes" clause was "a standard form used by the Government in all construction contracts." General Contracting and Construction Co. v. United States, 84 Ct. Cl. 570, 579 (1937).

stand respondent to be suggesting that the Board's long-standing practice of paying subsidy for changes found eligible therefor has not been authorized by the statute, yet that is the import of its unfounded statement that the statute provides subsidy only for the "original cost." The objective of the Act is no less frustrated by forcing an owner to pay more than his share of the cost of an eligible change than by forcing him to pay a disproportionate share of the "original" contract price. In either case the owner is forced partially to subsidize the domestic shipbuilding industry, which is a perversion of the Congressional intention.

II

Petitioner argued below that the Board's action was without rational basis, that it violated the Board's own stated policies and that it unjustly discriminated against petitioner and in favor of others similarly situated. Petitioner contends here that the court below failed to consider and resolve the issues thus raised, presenting for this Court a significant issue respecting the proper function of a reviewing court in matters involving exercise of discretion by contracting agencies.

Respondent states generally that the "Board's actions were fully considered by the court below" (Br. 13), but does not attempt to show where in the court's decision petitioner's arguments or the reasoning of the Board were considered. Nor does respondent answer petitioner's contentions as to the significance of the issue for consideration by this Court.

Respondent refers to the lower court's statement that "the action of the Board was not arbitrary nor an abuse of discretion, but was a valid exercise of the authority conferred upon it by the contracts" (Br. 13). This conclusory statement by the court does not evidence consideration of the specific issues raised by petitioner, and to accept it as such would be to license avoidance of judicial responsibility. In view of the court's earlier statement that the reasons for the Board's action were "not material" and of the court's failure to discuss or consider those reasons, it cannot be pre-

sumed that the lower court in fact considered the reasons for the Board's action or petitioner's contentions respecting those reasons.

Respondent does not dispute the proposition that, as the court below has elsewhere held, "[a] party vested with contractual discretion must exercise that discretion reasonably and may not do so arbitrarily or capriciously."[6] It was impossible for the lower court to determine in this case that the Board's exercise of discretion was not arbitrary without finding the reasons upon which the Board's action was based (see Pet. 15-16),[7] just as it is impossible for this Court to determine that the lower court's action was valid absent evidence of consideration of all issues presented to that court and a statement of its reasons for its actions upon those issues.

III

At pages 17-20 of the petition there is demonstrated the existence of genuine issues of fact respecting both petitioner's and the Board's understanding of the pertinent contract language at the time the contracts were executed. Respondent (Br. 13-14) contends that the principal issue below was that of "the legal effect of the Board's 1960 letter with respect to the contract terms." It is clear from the lower court's opinion itself, however, that its conclusion as to the legal effect of the 1960 letter rested upon the court's findings as to both the meaning that the Board intended to convey (see Pet. 13A) and petitioner's "knowledge" of that meaning when it executed the contracts (Pet. 15A), both of which are in dispute.

[6]Pacific Far East Line, Inc. v. United States, 184 Ct. Cl. 169, 184 (1968).

[7]While the court below found that the "Board did not give any reason for its action nor state on what basis it was limiting its subsidy participation in its decision of May 18, 1965" (see Pet. 15A), respondent says that "[t]he reasons for this decision were fully indicated in the letter [of May 18, 1965] transmitting the decision to petitioner" (Br. 6).

Finally the fact that petitioner had moved for summary judgment upon its legal theory of the case was not an indication that petitioner believed there were no factual issues presented upon the Government's theory.

Respectfully submitted,

ODELL KOMINERS
J. ALTON BOYER
MICHAEL JOSEPH
500 Tower Building
Washington, D.C. 20005
Counsel for Petitioners

Of Counsel:
KOMINERS, FORT,
SCHLEFER & BOYER

October 5, 1970